No. 80-2175

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONTROL DATA CORPORATION, *et al.*,
Petitioners,

v.

MALCOLM BALDRIGE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE FOR COMPUTER & BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION (CBEMA)

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This brief *amicus curiae* is submitted by the Computer & Business Equipment Manufacturers Association (CBEMA) in accordance with Rule 36.1 of this Court. CBEMA has received written consent from each of the petitioners and respondents to file this brief. The letters of consent from petitioners and respondents have been filed with the Clerk of the Court.

INTEREST OF COMPUTER & BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION (CBEMA)

CBEMA is the trade association which, together with its predecessor organizations, has represented the computer and business equipment industry for the past 65 years. The thirty-eight companies comprising the current CBEMA membership include both small and large manufacturers of computers, data processing and office equipment, and supplies.[1] A number of CBEMA's members provide data processing equipment and services to the federal government. During 1980, CBEMA's members had total industry-related revenues in excess of $50 billion worldwide. Of that total, CBEMA's members received approximately $5 billion from contracts with the federal government.

The members of CBEMA who manufacture computer products consistently have been forerunners in achieving major developments in both the concept and application of computer programming and data processing, and have contributed greatly to the present significant status and role of the computer in modern society. As predicted, the

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[1] The following companies are members of CBEMA: Acme Visible Records, Inc.; AM International, Inc.; AMP Incorporated; Apple Computer Inc.; Bell & Howell, Phillipsburg Division; Burroughs Corporation; Contitronix Inc.; Control Data Corporation; Datapoint Corporation; Dictaphone Corporation; Digital Equipment Corporation; EXXON Enterprises; Eastman Kodak Company; GF Business Equipment, Inc.; General Binding Corporation; Harris Corporation; Hewlett-Packard Company; Honeywell Inc., Micro Switch Division; Honeywell Information Systems, Inc.; IBM Corporation ("IBM"); ICL Incorporated; Lanier Business Products, Inc.; Liquid Paper Corporation; Minnesota Mining and Manufacturing Company; NCR Corporation; Olivetti Corporation; Philips Business Systems, Inc.; Pitney Bowes, Inc.; Remington Rand Corporation; Sanders Associates, Inc.; Sony Corporation of America; Sperry UNIVAC; TRW Incorporated; Tektronix, Inc.; Texas Instruments Incorporated; The Standard Register Company; UARCO Incorporated; and Xerox Corporation.

computer industry has rapidly become the "engine" which assists in running our society [2] and in the future will assist man in numerous areas unrelated to the usual applications of today. Computer uses and applications can be found in almost every field, including medicine, education, law, manufacturing, space exploration, national defense, science, transportation and home management. The tremendous growth in uses for computer technology has taken place in a legal environment largely subject to free market forces conducive to innovation.

CBEMA is also an approved sponsor under the American National Standards Institute [3] for the processing of domestic and international standards relating to information processing, computers and office machines. As an approved sponsor for processing of such domestic and international standards, the members of CBEMA maintain and support extensive activities devoted to development of voluntary industry standards. Prior to adoption of the standards at issue in this case, CBEMA provided the Department of Commerce with extensive testimony and written comments concerning these standards.

Adoption of the mandatory federal government standards for interface devices at issue in this case will have an adverse economic effect upon the growth potential and direction of the computer industry. For that reason, the present case is of vital importance to the entire technological future of our society as well as to CBEMA members in the computer and data processing field. Since the federal government is one of the largest users of computer equipment, resolution of the substantive issues presented by this case will have a significant influence upon

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[2] Binger, *The Computer: Engine of the Eighties, Advanced Management Journal* (January 1967).

[3] The American National Standards Institute is a nationally recognized clearinghouse and sponsor for development of nationally coordinated voluntary safety, engineering and industrial standards.

the immediate and long-term research and development planning of CBEMA members. However, because the Court of Appeals held that petitioners, the parties most directly injured by the allegedly unlawful agency action at issue here, do not have standing to seek judicial review of such agency action, CBEMA members also are vitally concerned with the resultant insulation from judicial review of future agency action by the Secretary of Commerce and other federal agencies.

REASONS FOR GRANTING THE WRIT

I. Resolution of the Standing Issue Presented Is Necessary Because the Court of Appeals Decision Would Immunize Allegedly Unlawful Agency Action From Judicial Review and Have a Significant Adverse Impact Upon Technological Innovation in the Computer Industry.

The practical effect of the Court of Appeals decision denying petitioners standing is to immunize from judicial scrutiny the action taken by the Secretary of Commerce ("Secretary") in this case, as well as future similar action. Since petitioners are the persons most directly injured by the Secretary's action, the Court of Appeals decision necessarily would deny standing to other persons, such as the members of CBEMA, who are affected by the standards [4] and, thus, foreclose any judicial review of the

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[4] The specifications established as mandatory by the Secretary were developed and copyrighted by IBM in the early 1960's. Petitioners' computer systems do not utilize the mandated specifications. Petitioners alleged, and the government conceded, that petitioners will be economically damaged until their systems are brought into compliance. Unlike petitioners, CBEMA's interest in whether the Secretary acted in accordance with statutory authority and followed proper procedures is based on the more generalized impact of the standards in dampening the future growth of the computer industry.

agency action at issue herein. The Court of Appeals asserted that its decision had not "insulated the Secretary's action from critical review" because the Secretary promised to review the standards in three years and because "Congress will interject itself into the process and insist upon the necessary corrective measures." Petitioners' Appendix at 28a. Such observations offer small comfort to petitioners and other affected persons, however, particularly in light of the fact that a principal allegation of petitioners' complaints was that the Secretary's action was not authorized by, and was in violation of, the statute in question. *See* Petitioners' Appendix at 29a. In essence, the Court of Appeals held that the Secretary's action was not subject to *judicial review*, without finding any evidence that Congress intended to preclude such review.

This result does not comport with this Court's settled view that the Administrative Procedure Act "embodies the basic presumption of judicial review" and "manifests a congressional intention that it cover a broad spectrum of administrative actions. . . ." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-41 (1967). Indeed, the Court of Appeals explicitly stated that it found it "unnecessary" to determine if there was a " 'clear and convincing' indication of a legislative intent to withhold judicial review," even though the practical effect of its decision was to preclude such review. Petitioners' Appendix at 11a. Respondents presented no evidence, however, that Congress intended to immunize the Secretary's computer standards-making process from judicial review. Therefore, Congress implicitly intended that *some* person or class of persons have standing to initiate judicial review of such agency action. Petitioners, as the persons most directly injured, are the logical choice.

Before promulgating the four computer standards establishing mandatory specifications for all major computer

systems purchased by federal agencies, the Secretary was warned by CBEMA and others that the specifications would curtail technological innovation in the computer industry by freezing a basic element of all computer systems. The rules adopted by the Secretary establish mandatory standards for the functional, mechanical and electrical connection between the central processing unit or mainframe of a computer and all peripheral units such as display terminals, keyboards, printers, and disk and magnetic tape storage units. In its comments on the proposed rules, CBEMA questioned the Secretary's choice of specifications developed many years ago by IBM [5] primarily because the input/output interface defines a major aspect of the internal architecture of a computer system. Freezing any major aspect of the internal structure of a computer limits improvements and innovations in computer design. Due to the rapidly changing technology involved, flexibility in the internal architecture of computers is the key element in the continuing quest for reduced costs and improved effectiveness in this vital industry. In addition, continued flexibility in the internal architecture will be an important element in attempting to maintain America's leading position in the international computer marketplace.

In summary, CBEMA opposed the Secretary's adoption of mandatory standards which would likely affect technological innovation, and is vitally concerned about the legality of the Secretary's action. The Court of Appeals narrow interpretation of the manner in which the zone of interests test for standing is applied has altogether precluded judicial scrutiny of that allegedly unlawful action.

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[5] IBM, in its comments on the proposed specifications, also noted that "this interface leaves little room for technological growth." Admin. Rec. at 605.

II. The Requirements for Standing to Obtain Judicial Review of Federal Agency Action Need Clarification by This Court.

A. *The Court of Appeals Indicated the Need for Clarification by This Court of the Zone of Interests Standing Test.*

The Court of Appeals held that petitioners had satisfied the constitutional aspect of the standing inquiry, which requires "that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant . . . ." Petitioners' Appendix at 11a n.6, *quoting Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). The Court held, however, that petitioners were excluded because of a prudential limitation on standing, which requires that petitioners assert injury to "an interest arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 30a, 11a.

Since the initial appearance of the zone of interests test, in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), this Court has not specified guidelines for applying that test or otherwise attempted to apply it. As a result, there has been a lengthy succession of lower court decisions which reflect a general confusion engendered by the amorphous nature of the test. The Court of Appeals herein briefly surveyed those decisions, finding that some courts "have expressed disagreement with the standard, clearly misapplied it, or virtually ignored it," and also noted that "one commentator has suggested that [the Supreme Court's] neglect indicates the Court's implicit abandonment of the zone standard." Petitioners' Appendix at 21a, 16a, *citing* K. Davis, *Administrative Law Treatise* § 22.02-11, at 509 (Supp. 1976) (footnote omitted). The Court of Appeals herein, however, believed that this Court's "express re-

affirmation of the test's existence, albeit in summary fashion, requires us to assume . . . the test's continued role as a prudential limitation." *Id.* at 16a-17a, *citing Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979) and other cases.[6]

In attempting to apply the zone of interests test for standing, the Court of Appeals repeatedly noted the importance of reaching the merits of the complaints herein but, nonetheless, denied petitioners standing to do so.

> We recognize that . . . appellants here allege substantial economic loss from the challenged agency action. We acknowledge as well the undoubted public interest in having the Secretary give appropriate attention to the importance of competition in his formulation of I/O interface standards.

Id. at 18a.[7]

CBEMA agrees with petitioners' suggestion that "[t]he assumption of the court below that one must be an intended beneficiary of the statute at issue to assert an interest arguably within the 'zone of interests' of that statute is in conflict with the essential basis of decisions by this Court." [8] Petition at 11. In each of those decisions, this Court held that plaintiffs had standing to challenge agency action under statutes which, if analyzed in terms

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[6] The Court of Appeals stated: "In *Gladstone*, for example, the Court addressed the zone standard in this manner: 'There are other nonconstitutional limitations on standing to be applied in appropriate circumstances.'" *Id.* at 16a n. 12.

[7] Later, the Court stated, "we realize that these observations offer small comfort in the face of the economic injury appellants may suffer . . . ." *Id.* at 29a.

[8] *Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971); *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970); and *Barlow* v. *Collins*, 397 U.S. 159 (1970).

of "intended beneficiaries", would have precluded standing. The Court of Appeals "intended beneficiary" approach herein effectively revives the "legal rights" test as the basis of standing, which test "was explicitly disavowed by this Court in *Data Processing*, 397 U.S. at 153." *Id.* at 13. The Court of Appeals, however, emphasized the need for this Court to clarify the manner in which the zone of interests test for standing is applied in stating "we feel our decision is compelled by the present law of standing." Petitioners' Appendix at 29a.

B. *The Zone of Interests Standing Test Should Be Clarified or, in the Alternative, Overruled by This Court.*

Because it denied petitioners standing, the Court of Appeals found it unnecessary to focus on whether Congress clearly intended to withhold judicial review of the Secretary's action. Petitioners' Appendix at 11a n. 7. Thus, the Court of Appeals wooden approach to the question of standing highlights an inherent weakness in the zone of interests standing test which was first recognized in the opinion dissenting from the Court's treatment of the question of standing in both *Barlow* v. *Collins* and *Data Processing*, 397 U.S. at 167.

As Justice Brennan stated:

> Before the plaintiff is allowed to argue the merits, it is true that a canvass of relevant statutory materials must be made in cases challenging agency action. But the canvass is made, not to determine *standing*, but to determine an aspect of *reviewability*, that is, whether Congress meant to deny or to allow judicial review of the agency action at the instance of the plaintiff. The Court in the present cases examines the statutory materials for just this purpose but only after making the same examination during the second step of its standing inquiry. . . .

> The acts do not in terms protect a specific group. But their general policy is apparent; and those whose interests are directly affected by a broad or narrow interpretation of the Acts are easily identifiable. . . .
>
> I submit that in making such examination of statutory materials an element in the determination of standing, the Court not only performs a useless and unnecessary exercise but also encourages badly reasoned decisions, which may well deny justice in this complex field. When agency action is challenged, standing, reviewability, and the merits pose discrete, and often complicated, issues which can best be resolved by recognizing and treating them as such.

397 U.S. at 169-70 (emphasis in original; footnotes omitted).

Had the Court of Appeals correctly interpreted the zone of interests test for standing in light of both the dissenting opinion in *Barlow* and *Data Processing* and this Court's presumption in favor of judicial review, petitioners clearly would have *standing* to challenge the Secretary's action because that action caused them direct injury in fact. The issue of whether Congress clearly intended to withhold judicial review of the Secretary's action required an analysis of the pertinent legislative material that is quite different from the Court of Appeals "intended beneficiary" approach. The governing principle laid down in *Abbott Laboratories* v. *Gardner*, *supra*, is that "judicial review of a final agency action by an aggrieved person will not be cut off *unless there is persuasive reason to believe that such was the purpose of Congress.*" 387 U.S. at 140 (emphasis added).

Had the Court of Appeals followed the principles of *Abbott Laboratories*, the merits of petitioners' challenge would have been reached, since courts are likely to permit review of agency action "particularly . . . when the plaintiff is the only party likely to challenge the action.

Refusal to allow him review would, in effect, commit the action wholly to agency discretion, thus risking frustration of the statutory objectives." *Barlow* v. *Collins*, 397 U.S. at 175 n.9 (concurring and dissenting opinion). Accordingly, the petition for a writ of certiorari herein should be granted so that the Court may consider clarifying the zone of interests test for standing in order to differentiate it from the separate test for reviewability.

In the alternative, the Court may wish to consider specifically repudiating the zone of interests test as a test for standing. In *Continental T. V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the Court overruled the holding of *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), which required that alleged vertical restrictions be analyzed in accordance with the *per se* rule of illegality under the antitrust laws. In so doing, the Court stated:

> Although *Schwinn* is supported by the principle of *stare decisis*, . . . we are convinced that the need for clarification of the law in this area justifies reconsideration. . . . Since its announcement, *Schwinn* has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts. . . . In our view, the experience of the past 10 years should be brought to bear on this subject of considerable commercial importance.

433 U.S. at 47-49 (footnotes omitted). Likewise, the need for clarification of the standing doctrine justifies this Court's reconsideration of *Data Processing* and its progeny.

CONCLUSION

The decision below effectively immunizes from judicial review allegedly unlawful agency action with widespread adverse effects. This ruling is primarily the result of the disarray and confusion surrounding the zone of interests test for standing. This confusion was both recognized and deplored by the Court of Appeals. The petition for a writ of certiorari should be granted to clarify the requirements for standing to challenge allegedly unlawful agency action or, in the alternative, to reconsider the zone of interests test as a requirement for standing.

Respectfully submitted,

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